OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22

May 31, 2005

Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Dana Dudley, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25989
Heard November 4, 2004 – Filed May 31, 2005

AFFIRMED AS MODIFIED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Druanne Dykes White, of Anderson, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

JUSTICE PLEICONES: The Court granted certiorari to consider an *en banc* decision of the Court of Appeals holding that extraterritorial jurisdiction is a component of subject matter jurisdiction such that the issue could be raised and considered for the first time on appeal. State v. Dudley, 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003). We affirm as modified.

FACTS

Respondent, a resident of the Atlanta area, was a long time friend of Donald Stokes. Stokes and Earl Hale, residents of Roanoke, Virginia, were drug dealers. Stokes called respondent from Virginia and told her he and Hale were coming to Atlanta. Once there, the men contacted respondent and arranged to purchase cocaine from her. Stokes and Hale left Atlanta, driving back to Roanoke with the drugs.

Stokes and Hale were stopped on Interstate 85 in Anderson County, South Carolina. Hale, the driver, consented to a search of the vehicle, which led to the discovery of 249 grams of powder cocaine. Stokes and Hale were arrested. The men then entered "substantial assistance agreements" whereby they agreed to assist law enforcement agencies in Virginia and South Carolina in making drug cases. They identified respondent as the supplier of the 249 grams.

Stokes, monitored by law enforcement officers, made several phone calls to respondent in an attempt to set up the purchase of more cocaine.[1] While respondent agreed to expedite a deal, she declined to meet Stokes and Hale in South Carolina to consummate it. Eventually Stokes, in the company of several law enforcement officers, traveled to the Atlanta area. Once there, Stokes, at the direction of the officers, made excuses why he could not come further into the city as respondent requested. Finally, respondent came to Stokes who was waiting in a suburban Atlanta parking lot. When respondent

[1] The record does not indicate that respondent was aware that these calls originated in South Carolina.

arrived, she was arrested by South Carolina authorities. She had no cocaine in her possession at the time of her arrest.

Respondent was indicted for trafficking cocaine by aiding and abetting Stokes and Hale in bringing the 249 grams of cocaine into South Carolina (trafficking charge). She was indicted for conspiring to traffic cocaine in Anderson County in connection with the second planned sale (conspiracy charge). Respondent was convicted of both trafficking and conspiracy and received concurrent twenty-five year sentences and was ordered to pay two six-thousand-dollar fines.

A panel of the Court of Appeals reversed respondent's conspiracy conviction, and by a vote of two to one, affirmed the trafficking conviction. Judge Connor dissented, and would have vacated both convictions finding South Carolina lacked extraterritorial jurisdiction.

A petition for rehearing *en banc* was granted to consider the validity of the trafficking conviction.[2] The *en banc* majority concluded that the exercise of extraterritorial jurisdiction was a component of subject matter jurisdiction that could be raised for the first time on appeal, and vacated respondent's conviction, finding no evidence she intended a detrimental effect in South Carolina. In dissent, Judge Anderson maintained respondent was raising a personal jurisdiction claim, which she had waived by failing to object at trial. He nevertheless held there was evidence of "intended effects" in South Carolina as to the trafficking charge. Judge Stilwell also dissented, and would have held that extraterritorial jurisdiction was not an element of subject matter jurisdiction, but was either a component of personal jurisdiction or some third type, and that in any case respondent had waived any right to complain by not objecting at trial. He, too, would have affirmed the trafficking conviction.

We granted certiorari to review the *en banc* decision.

[2] The State has not challenged the reversal of the conspiracy conviction.

ISSUE

Is the issue of extraterritorial jurisdiction a component of subject matter jurisdiction?

ANALYSIS

The Court of Appeals *en banc* majority erred in holding that extraterritorial jurisdiction is a component of subject matter jurisdiction. Subject matter jurisdiction refers to the court's power "to hear and determine cases of the general class to which the proceedings belong…." State v. Gentry, Op. No. 25949 (S.C. Sup. Ct. filed March 7, 2005). The circuit court has original jurisdiction in all criminal matters except those where an inferior court is given exclusive jurisdiction. S.C. Const. art. V, § 11 (Supp. 2004). Magistrates and municipal courts have exclusive jurisdiction over all state criminal charges where the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days. S.C. Code Ann. § 22-3-540 (1988); S.C. Code Ann. § 14-25-45 (Supp. 2004). Trafficking in cocaine, the crime at issue here, is punishable by a minimum sentence of three years and a $25,000 fine.[3] It therefore exceeds the inferior courts' exclusive jurisdictional limits. The circuit court has subject matter jurisdiction over the general class of trafficking charges. Gentry, *supra*.

Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding. Compare, e.g., Gordon v. Commonwealth, 38 Va. App. 818, 568 S.E.2d 452 (Ct. App. 2002) (claim that crime did not occur in state not waived by failure to timely raise it). The exercise of extraterritorial jurisdiction implicates the state's sovereignty,[4] a question so elemental that we hold it cannot be waived by conduct or by consent.

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[3] S.C. Code Ann. § 44-53-370(e)(2) (2002).

[4] See S.C. Code Ann. § 1-1-10 (Supp. 2003) ("The sovereignty and jurisdiction of this State extends to all places within its bounds….").

While a defendant need not be physically present in the State in order to commit a criminal offense here, the State's extraterritorial jurisdiction extends only to those who have performed acts "intended to produce and producing detrimental effects within" our boundaries. Strassheim v. Daily, 221 U.S. 280, 31 S. Ct. 558, 55 L.Ed. 735 (1911); see also State v. Morrow, 40 S.C. 221, 18 S.E. 833 (1893). We agree with the Court of Appeals majority that there is no evidence that respondent intended a detrimental effect in South Carolina when she sold the cocaine to Stokes and Hale. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

MOORE, A.C.J., WALLER, BURNETT, JJ., and Acting Justice Edward V. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Karl Albert Overcash, III, Respondent,

v.

South Carolina Electric and Gas Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 25990
Heard February 2, 2005 – Filed May 31, 2005

REVERSED AND REMANDED

Robert A. McKenzie and Gary H. Johnson, II, of McDonald, McKenzie, Rubin, Miller, and Lybrand, L.L.P., all of Columbia, for Petitioner.

A. Camden Lewis, of Lewis, Babcock & Hawkins, L.L.P., and Fred A. Walters, both of Columbia, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in Overcash v. South Carolina Electric & Gas Co., 356 S.C. 165, 588 S.E.2d 116 (2003). We reverse.

FACTUAL/PROCEDURAL HISTORY

Respondent Karl Albert Overcash, III (Overcash) brought this action seeking damages against Appellant South Carolina Electric & Gas Company (SCE&G) for the injuries he sustained, alleging, among other things, statutory and common law public nuisance. Overcash was severely injured when his boat collided with a dock owned by Sarah and Crawford Clarkson. Overcash alleges the dock connected the Clarkson's property to a small island more than 200 feet from their property and across the navigable waters of Lake Murray. Overcash further alleges SCE&G allowed the dock to be built, deeded the island to the Clarksons, and granted a post-construction permit for the dock.

The Clarksons settled the claims against them and are no longer a party to the suit. The circuit court granted SCE&G's motion to dismiss Overcash's public nuisance cause of action pursuant to Rule 12(b)(6), SCRCP, concluding: (1) personal injuries are not " special injuries" and thus cannot be the basis for a private action for public nuisance; and (2) a private cause of action for public nuisance does not exist pursuant to S.C. Code Ann. § 49-1-10 (1987).

The Court of Appeals reversed and remanded the case to circuit court concluding: (1) Overcash could maintain a common law cause of action under the doctrine of public nuisance for merely personal injuries; and (2) S.C. Code Ann. § 49-1-10 provides a private, statutory cause of action for public nuisance.

ISSUES

I. Did the Court of Appeals err in recognizing a common law

cause of action under the doctrine of public nuisance for purely personal injuries?

II. Did the Court of Appeals err in holding S.C. Code Ann. § 49-1-10 provides a private, statutory cause of action for public nuisance?

LAW/ANALYSIS

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

I.

The Court of Appeals concluded Overcash's personal injuries constitute direct and special injuries, which support a private tort action for public nuisance. We decline to venture into what William Prosser has termed the "impenetrable jungle," electing instead to follow the well-beaten path to which South Carolina nuisance jurisprudence has long adhered. See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser & Keeton on Torts § 86 at 616 (5th ed. 1984). We reverse.

Under English common law, an action for nuisance was reserved for an interference with the use or enjoyment of rights in land. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966). As noted by the Court of Appeals, modern nuisance law originates from the medieval English criminal writ of "purpresture." The earliest cases involved purprestures, encroachments upon the royal domain or the king's highway,

and were redressed by the crown in a criminal proceeding. According to Prosser, "[t]here was sufficient superficial resemblance between the obstruction of a private right of way and the obstruction of a public right of passage to content the judges with calling the latter a nuisance as well." Id. at 998. Thus was born the public nuisance. Over time, the public nuisance doctrine has been expanded to cover other invasions of the rights of the general public including violations of the public order, decency, morals, and health. 58 Am. Jur. 2d Nuisances § 39 (2002).

The dissent by Justice Fitzherbert in a 1536 King's Bench decision derailed the course of nuisance law as a branch of the common law, which once dealt only with harm to real property. Justice Fitzherbert argued against the contemporaneous understanding of the law in advocating an individual's action for special or particular damage, including personal injury, should be recognized under a cause of action for public nuisance. Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536). Although Justice Fitzherbert's view has been widely followed by other courts, we decline to recognize a common law cause of action under the doctrine of public nuisance for purely personal injuries.

South Carolina has avoided the uncertainty and confusion surrounding personal injuries in public nuisance actions. The cases in South Carolina concerning a private action for a public nuisance have involved an alleged damage to an individual's real or personal property as the "special injury" required to maintain an action for public nuisance. See e.g., Burrell v. Kirkland, 242 S.C. 201, 130 S.E.2d 470 (1963) (abutting landowner requested injunction for neighbors' obstruction of public road); Huggin v. Gaffney Dev. Co., 229 S.C. 340, 92 S.E.2d 883 (1956) (plaintiff sues for damages on alleged obstruction of public road alleging he was unable to obtain agricultural labor from a source at the opposite end of the road); Crosby v. Southern Ry. Co., 221 S.C. 135, 69 S.E.2d 209 (1952) (plaintiff alleged diminution in value of real property cause by blocked street).

This Court has never specifically concluded that an individual has a common law cause of action under the doctrine of public nuisance for purely personal injuries. The Court of Appeals relies on the decisions in

Drews v. Burton & Co., 76 S.C. 362, 57 S.E. 176 (1907) and Carey v. Brooks, 19 S.C.L. 365, 1833 WL 1682 (Ct. App. 1833). In Drews, the plaintiff brought an action for negligence arguing that a log from the defendant's mill drifted into navigable waters and damaged the plaintiff's schooner. In deciding the merits of the defendant's argument, the Court found that Section 1335 of the Code of Laws of 1902 provided that any person who obstructed a navigable waterway was guilty of nuisance. The Court, citing Carey, stated "[w]hen a person sustains a special injury . . . arising from the obstruction of a navigable stream, he is entitled to recover damages, on the ground that such obstruction constitutes a nuisance under the statute, as well as at common law." Id. 76 S.C. at 366, 57 S.E. at 178.

The decision in Drews does not recognize a cause of action for purely personal injuries under a public nuisance theory. In Drews, the plaintiff alleged property damage to his schooner, not injuries to his person. We do not read the Court's holding to sanction an individual's recovery for personal injuries in a public nuisance action.

Likewise, the decision in Carey, did not involve personal injuries. In Carey, the plaintiff brought an action to recover for the obstruction of a navigable waterway, a public nuisance. The obstruction caused a delay in the delivery of the plaintiff's lumber to a third party, which resulted in damages. The court concluded if by such nuisance, a party suffers a particular damage, the plaintiff could recover. The Court of Appeals then recited Justice Fitzherbert's general illustration regarding corporeal hurt to the individual as constituting a "special injury." [1] We conclude the Court of Appeals rested its decision in large part on the dicta contained in this case. To the extent the

[1] Justice Fitzherbert's famous hypothetical is the origin of the modern special injury rule, which is often referred to and widely accepted by courts. Fitzherbert envisioned a rider on horseback who is thrown when he encounters a ditch across the highway. Because the rider was injured and suffered greater damage than all others, Fitzherbert argued the rider should have action for public nuisance against the maker of the ditch. See Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536).

decisions in Drews and Carey suggest we recognize a cause of action for purely personal injuries under the doctrine of public nuisance, we hereby overrule those cases.[2]

We conclude the special or particular injury requirement necessary for an individual to maintain a cause of action for public nuisance is satisfied only by injury to the individual's real or personal property. For the protection of the person, South Carolina has well developed tort-based doctrines which can redress wrongs resulting in personal injuries sustained by an individual. The addition of personal injury to public nuisance actions in South Carolina would perpetuate the erosion of any semblance of doctrinal consistency in the common law of nuisance. Therefore, we reverse.

II.

SCE&G argues the Court of Appeals erred in finding that a private right of action exists from a violation of S.C. Code Ann. § 49-1-10 (1987). We agree.

Section 49-1-10 provides the following:

> … [A]ll navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free . . . . If any person shall obstruct any such stream . . . , such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law.

The Court of Appeals improperly relied on Drews, 76 S.C. 362, 57 S.E. 176, and failed to look for intent on the part of the legislature to

[2] The decisions in Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603 (1947) and Bowlin v. George, 239 S.C. 429, 123 S.E.2d 528 (1962) also contain dicta stating the "special injury" requirement would be satisfied by injury to "property or health." To the extent an injury to "health" implies personal injuries, we decline to adopt the dicta in these cases suggesting an individual has a cause of action in public nuisance for purely personal injuries.

create a private cause of action. In Drews, the Court found that Section 1335 of the Code of Laws of 1902 provided that any person who obstructed a navigable waterway was guilty of a nuisance. The Court also stated in dicta that a person who sustains a special injury from the obstruction of navigable waterways is able to recover damages on the ground that such an obstruction constitutes a nuisance both under the statute and at common law. Drews, 76 S.C. at 366, 57 S.E. 176 at 178.

Section 1335 provided "if any person shall obstruct [a navigable waterway], . . .such person shall be deemed guilty of nuisance, and any such obstruction may be abated as other public nuisances are by the laws of this State." Section 1335 and Section 49-1-10 are practically identical in substance. However, the issue of a private right of action under Section 1335 was not squarely before the Court in Drews.

The main factor in determining whether a statute creates a private cause of action is legislative intent. Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990). In Dorman, we stated,

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute . . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Id. at 67, 398 S.E.2d at 689 (quoting Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)).

Section 49-1-10 reveals no legislative intent to create a private cause of action. Section 49-1-10 is found within the section of the Code entitled Waters, Water Resources, and Drainage. The section contains criminal penalties and allows for abatement of the nuisance. The statute is primarily for the benefit and protection of the public generally, and we conclude no private right of action exists for its violation.

CONCLUSION

For the foregoing reasons, the Court of Appeals' opinion reversing the circuit court's order dismissing Overcash's cause of action for public nuisance is reversed and the case remanded for further proceedings consistent with this opinion.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in part and concurring in part in a separate opinion in which Perry M. Buckner, concurs.

CHIEF JUSTICE TOAL: I join in Part II of the opinion, but decline to join in Part I. In my view, a plaintiff may maintain a cause of action for public nuisance for personal injuries upon a showing of special injury. Therefore, I dissent in part; and would affirm the court of appeals in result.

In my opinion, the majority misconstrues the concept of a public nuisance. According to the majority, Overcash's personal injuries can be separated from the injury to property. In my view, no distinction can be drawn between personal physical injury and injury to property. I cannot find a rationale to separate Overcash's physical injury from that of his boat. As the majority construes common law nuisance, Overcash can recover for the injury to his boat, but not for the injury to his person. I think this approach is illogical and flies in the face of basic hornbook law. *See* Restatement (Second) of Torts § 821C (stating that when a public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by the other members of the pubic and the tort action may be maintained); Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1012 (1966) (opining that there can now be no doubt that the nuisance action can be maintained where a public nuisance causes physical injury); 58 Am. Jur. 2d *Nuisances* § 252 (2002) (stating that personal injuries are sufficient to show an individual's peculiar injury as required to maintain an action for public nuisance and injuries to a person's health are by their nature special and peculiar for the purposes of maintaining such an action).

Accordingly, I would affirm the holding of the court of appeals recognizing a common law cause of action for public nuisance for personal injury and remand the case to circuit court for trial on that cause of action. In addition, I would reverse the decision to recognize a private cause of action under S.C. Code Ann. § 49-1-10 (1987).

Acting Justice Perry M. Buckner, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gay Ellen Coon, Respondent,

v.

James Moore Coon, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
H. E. Bonnoitt, Jr., Family Court Judge

Opinion No. 25991
Heard May 4, 2005 – Filed May 31, 2005

AFFIRMED AS MODIFIED

Alex B. Cash, and Donald Bruce Clark, both of Charleston, for Petitioner.

Ronald L. Richter, Jr., of Charleston, for Respondent.

JUSTICE PLEICONES: This is a divorce case. We granted a writ of certiorari to review Coon v. Coon, 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003), in which the Court of Appeals reversed the family court's decision to vacate a domestic-relations order. We affirm.

FACTS

Pursuant to the parties' settlement agreement, the family court entered an order that apportioned Mr. Coon's United States Department of Defense (DOD) retired pay. Under the order, Mrs. Coon was to receive one hundred percent of Mr. Coon's "disposable retired pay"[1] for nine years, and thereafter receive fifty percent. The order provided that the DOD plan administrator pay Mrs. Coon directly.

The order was never sent to the plan administrator, however. All of the retired pay was paid directly to Mr. Coon, who, in turn, remitted the money to Mrs. Coon. Under this arrangement, Mr. Coon was deemed the recipient of all of the retired pay and was thus responsible for all of the taxes.

At some point, Mr. Coon increased the amount of federal income tax withholding from the retired pay, causing a decrease in the net amount remitted to Mrs. Coon. Mrs. Coon petitioned for a rule to show cause why Mr. Coon was not in contempt of the family court's order. In response, Mr. Coon moved the family court pursuant to Rule 60(b)(4), SCRCP, to vacate the portion of the order distributing the retired pay. Mr. Coon argued that under the Uniformed Services Former Spouses' Protection Act (the USFSPA or the Act),[2] the family court lacked subject-matter jurisdiction to order that Mrs. Coon receive more than fifty percent of Mr. Coon's disposable retired pay. Accordingly, Mr. Coon argued, the order was void. The family court agreed and vacated the order. Mrs. Coon appealed.

The Court of Appeals reversed, holding that the family court had subject-matter jurisdiction to apportion all of Mr. Coon's disposable retired

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[1] "Disposable retired pay" is "the total monthly retired pay to which a member [of the military] is entitled less" certain amounts listed in the statute. 10 U.S.C.A. § 1408(a)(4) (1998).

[2] 10 U.S.C. § 1408 (1998 and Supp. 2004).

pay, although the court lacked "authority" to distribute more than half to Mrs. Coon. In other words, the family court committed a substantive error but not a jurisdictional one, so Mr. Coon was not entitled to relief under Rule 60(b)(4). The Court of Appeals ordered the reinstatement of the order and remanded for further proceedings.[3]

ISSUE

Whether the family court had subject-matter jurisdiction to distribute to Mrs. Coon more than fifty percent of Mr. Coon's disposable retired pay.

ANALYSIS

We agree with the Court of Appeals that the family court committed an error of law but did not lack subject-matter jurisdiction.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] … the judgment is void." Rule 60(b)(4), SCRCP. A judgment of a court without subject-matter jurisdiction is void. Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Subject-matter jurisdiction is the "power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). By statute, the family court has subject-matter jurisdiction to decide divorce actions and apportion marital property. S.C. Code Ann. §§ 20-7-420(2) and 20-7-473 (Supp. 2004).

In McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the United States Supreme Court held that the military-retirement statutes then in force prohibited states from dividing military retired pay pursuant to state community-property laws. McCarty applied with like force

[3] The further proceedings contemplated by the Court of Appeals relate to the rule to show cause and to a subsequent motion filed by Mrs. Coon to reform the family court's order. Because we affirm the Court of Appeals' decision on the merits, we also affirm the decision to remand.

to equitable-distribution states such as South Carolina. See Brown v. Brown, 279 S.C. 116, 118, 302 S.E.2d 860, 861 (1983) (citing Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982)). In response to McCarty, Congress enacted the USFSPA.

The USFSPA permits any court of "competent jurisdiction" to "treat disposable retired pay payable to a [service] member … either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C.A. §§ 1408(a)(1) and (c)(1) (1998). In other words, states have a choice whether to treat disposable retired pay as marital property. South Carolina has chosen to do so. See Tiffault v. Tiffault, 303 S.C. 391, 392, 401 S.E.2d 157, 157 (1991); Brown, 279 S.C. at 118, 302 S.E.2d at 861.

A court's authority, however, is subject to the following limitation: "The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay." 10 U.S.C.A. § 1408(e)(1). As the Court of Appeals noted, this limitation applies whether the non-military spouse receives payments directly from the Department of Defense, from the service-member spouse, or a combination of the two. Coon, 356 S.C. at 349-50, 588 S.E.2d at 628.

Mr. Coon argues that the fifty-percent limitation prevents state courts from exercising subject-matter jurisdiction over the protected half of disposable retired pay. We disagree. The limitation supplants state domestic-relations law pursuant to the Supremacy Clause of the United States Constitution,[4] but it does not pre-empt state-court subject-matter jurisdiction.[5]

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[4] U.S. Const. art. VI.

[5] We respectfully disagree with the Supreme Court of Alaska, which recently held that the fifty-percent limitation is jurisdictional. Cline v. Cline, 90 P.3d 147, 152-54 (Alaska 2004).

See, e.g., Curtis v. Curtis, 7 Cal. App. 4th 1, 9 Cal. Rptr. 145 (Cal. Ct. App. 1st Dist. 1992) (holding that neither the McCarty decision nor the USFSPA involves subject-matter jurisdiction); Mansell v. Mansell, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (Cal. Ct. App. 5th Dist. 1989)[6] (same), cert. denied, Mansell v. Mansell, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990); Evans v. Evans, 75 Md. App. 364, 541 A.2d 648 (1988) (same). The USFSPA neither confers subject-matter jurisdiction on any court nor takes jurisdiction from any court. See Brown v. Harms, 863 F. Supp. 278, 280-81 (E.D. Va. 1994) (holding that federal courts are given no federal-question jurisdiction by the Act and finding that "the Act does no more than make clear that courts of competent jurisdiction, namely courts that already have subject matter jurisdiction from some proper source extrinsic to the Act, may treat a military pension" as marital property).

As the Court of Appeals noted, the USFSPA expresses no intention on Congress's part to pre-empt state-court jurisdiction. Coon, 356 S.C. at 351, 588 S.E.2d at 629. Further, we agree with the Court of Appeals that the use of the term "jurisdiction" in the 1990 House Report on the subsection (e)(1) amendment is unpersuasive. See H.R. Rep. No. 101-665, at 3005 (1990); Coon, 356 S.C. at 350, 588 S.E.2d at 628 (finding that by "jurisdiction," the House meant "authority").[7]

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[6] This California case was on remand from Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). There, the United States Supreme Court held that the USFSPA prevented "military retirement pay waived by the retiree in order to receive veterans' disability benefits" from being apportioned pursuant to state community-property (or equitable-distribution) laws. The reason was that in the Act Congress did not grant the states permission to apportion disability benefits. Thus, the pre-emption found in McCarty remained with respect to those benefits.

[7] Even the United States Supreme Court, in an unrelated matter, has recently stated: "'Jurisdiction' … is a word of many, too many, meanings. … Clarity would be facilitated if courts and litigants used the label 'jurisdictional' … only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling

We disagree, however, with the Court of Appeals' suggestion that the USFSPA's savings clause, section 1408(e)(5), "further undermines any argument that Congress explicitly directed the fifty-percent limitation is jurisdictional …." Coon, 356 S.C. at 351-52, 588 S.E.2d at 629. As already stated, the Act does not address subject-matter jurisdiction in any respect. It follows that the savings clause does not impact the jurisdiction issue one way or the other.

As stated above, the Court of Appeals' holding was correct. The Act does not pre-empt state-court jurisdiction, so the family court's jurisdiction is strictly a matter of South Carolina law. In this case, the family court did not exceed its jurisdiction. See S.C. Code Ann. §§ 20-7-420(2) and 20-7-473 (Supp. 2004); Dove, 314 S.C. at 237-38, 442 S.E.2d at 600. That the family court erred in failing to follow pre-emptive federal law does not change this result. Thus, Mr. Coon is not entitled to relief under Rule 60(b)(4), SCRCP.

CONCLUSION

The family court's order is not void for want of subject-matter jurisdiction, so the family court erred when it vacated the order. We therefore affirm the Court of Appeals' decision to reverse the vacatur and remand the case to the family court.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., concur.

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within a court's adjudicatory authority." Kontrick v. Ryan, 540 U.S. 443, 454-55, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867, 879 (2004) (parentheses in original).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Huffines Company, LLC, Respondent,

v.

Nancy R. Lockhart and
Morrison Payne as Trustee, Appellants.

Appeal From Colleton County
John C. Few, Circuit Court Judge

Opinion No. 3994
Submitted May 1, 2005 – Filed May 23, 2005

REVERSED AND REMANDED

Edward M. Brown, of Charleston, for Appellants.

W. Mullins McLeod, Jr. and M. Todd Rainsford, both of Charleston, for Respondent.

ANDERSON, J.: The Huffines Company, LLC, initiated this action against Nancy R. Lockhart (Lockhart) to recover a real estate brokerage commission. The circuit court found that Lockhart had breached

the parties' Listing Agreement and directed a verdict in favor of the Huffines Company, LLC. We reverse and remand for a new trial.[1]

FACTUAL/PROCEDURAL BACKGROUND

Calvert Huffines (Huffines) is a licensed real estate broker in South Carolina. He owns the Huffines Company, LLC, a small real estate company located in Colleton County. Lockhart hired Huffines to find a buyer for fifty acres of land located in Hendersonville, South Carolina (the Hendersonville property). She listed the Hendersonville property with Huffines on April 26, 1999, for a selling price of $250,000. The Listing Agreement provided, in pertinent part:

> I (we), the seller(s), grant you the right to sell or transfer this property from the date of this agreement to and including 4/30/2000, and to accept deposit thereon, and employ you to procure a purchaser, ready, willing and able to buy this property at the listed price and terms, or at a price and terms that are acceptable to me. . . .
>
> If a buyer or transferee ready, willing and able to buy or exchange for this property is procured by you, I agree to pay you a commission of 10% of the selling price, or a minimum commission of $200, whichever is greater.
>
> If within six months after the termination of this agreement I sell or transfer this property to a prospect procured by you prior to its termination, I shall pay you your commission . . . .

Huffines subsequently marketed the Hendersonville property. He informed area brokers of the listing, talked to neighboring property owners, and disseminated plats and descriptions of the property. Huffines learned

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

from a newspaper article that the Colleton County School Board (the School Board) was searching for property suitable for a new school. On November 10, 1999, he wrote a letter to the Colleton County Department of Education and School Board members to inform them that the Hendersonville property was for sale and "would make an excellent site for a school."

Elbert O. Duffie, general counsel for the Colleton County School District, was retained to seek out suitable properties for the new school. He compiled a list of twenty or thirty sites that met the School Board's criteria. The Hendersonville property was not placed on his initial list of suitable properties. However, Duffie was later forwarded a copy of the letter Huffines sent to the School Board. Duffie contacted Huffines and the two began a series of conversations concerning the property. Eventually, Duffie placed the Hendersonville property on his list of possible properties for the School Board to purchase.

Duffie informed Huffines that the School Board would be willing to pay a maximum of $3,500 an acre for the property. Huffines conveyed this information to Lockhart in an email dated March 20, 2000. Lockhart responded by email that same day, instructing Huffines to let the School Board know she was willing to accept that amount for the property. On March 21, 2000, the School Board held a regular meeting at which the trustees authorized Duffie to secure an option to purchase the Hendersonville property for $3,500 an acre. Duffie prepared a draft option contract. The School Board agreed to pay $1,000 for the option. On March 22, 2000, Lockhart emailed Huffines, informing him she did not feel the offer was a good one and requesting additional information about the transaction.

Duffie's next communication concerning the property was from Edward M. Brown, Lockhart's attorney. In a letter dated April 24, 2000, Brown informed Duffie that he had been asked to intercede in the real estate transaction. The letter stated that $3,500 an acre was unacceptable. Huffines received a letter from Lockhart, dated April 24, 2000, which requested he direct all communications concerning the property to Brown.

On April 30, 2000, the Listing Agreement expired. However, the agreement provided that Huffines was still entitled to a commission if the property was sold or transferred within six months of the expiration of the agreement to a buyer procured by Huffines. The six-month time period ran until October 30, 2000.

Brown and Duffie continued to negotiate the sale of the property after the Listing Agreement expired. Lockhart demanded a new price of $5,000 an acre and an option price of $10,000. The School Board trustees subsequently rejected the $5,000 an acre offer. Lockhart reduced the asking price to $4,500 an acre with a $1,000 option price. The trustees voted to accept that purchase price, and the parties signed an option contract on May 8, 2000. The option contract stated:

> Whereas, it is agreed that the Option price of the property located on Highway 17-A (Hendersonville Highway), near the Community of Hendersonville, in Colleton County, South Carolina, TMS#234-00-00-042, containing fifty (50) acres, more or less, and one (1) improvement shall be Four Thousand Five Hundred and No/100 ($4,500.00) Dollars per acre. . .
>
> . . . [B]ut in the event that the Option is not exercised within one hundred eighty (180) days, the Optionor is no longer obligated and may retain the One Thousand and No/100 ($1,000.00) Dollar consideration. . . .

Pursuant to a United States District Court Consent Order, issued on November 17, 1999, the School Board was required to obtain permission from the United States Justice Department before building a new school at a designated site. Duffie contacted a Justice Department attorney, Dan Foreman, prior to 2000. They subsequently discussed obtaining approval for the placement of a school upon the Hendersonville property. In early September of 2000, Foreman visited Colleton County and viewed the Hendersonville property. After observing the site, Foreman orally informed Duffie that the property was suitable for the purpose of a school. However, written approval was not forthcoming until November 1, 2000.

Lockhart testified that at some point after she signed the Listing Agreement, her half brother indicated he thought he should share in any proceeds obtained from the Hendersonville property. He later informed Lockhart that he had retained an attorney to pursue his claim. Lockhart filed a clear title action on September 18, 2000. Lockhart was adjudged the owner of the property in fee simple absolute on November 13, 2000.

On October 17, 2000, the School Board trustees voted to purchase the Hendersonville property pending approval from the U.S. Justice Department. Although no contract of sale was ever signed, Lockhart sold the Hendersonville property to the School Board on November 16, 2000, for $4,500 an acre.

Huffines attended the closing, but Lockhart refused to pay him a commission. The Huffines Company, LLC initiated this action alleging Lockhart breached the Listing Agreement by not paying Huffines a commission. The circuit court directed a verdict in favor of the Huffines Company, LLC on the breach of contract claim in the amount of $21,906. Additionally, the circuit judge held that Huffines procured a buyer in March of 2000 when he negotiated to sell the property for $3,500 an acre. The judge ruled that a sale or transfer of the property occurred in May of 2000 (within the six-month expiration period) when the School Board signed the option contract. He further held that a sale or transfer occurred on October 17, 2000, when the School Board voted to exercise the option contract. The jury rendered a verdict in favor of the Huffines Company on a breach of contract accompanied by a fraudulent act claim. However, no punitive damages were awarded.

STANDARD OF REVIEW

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."

Steinke v. South Carolina Dept't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); accord Hurd v. Williamsburg County, Op. No. 25959 (S.C. Sup. Ct. filed March 28, 2005) (Shearouse Adv. Sh. No. 14 at 28); Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003); Collins Entertainment, Inc. v. White, Op. No. 3935 (S.C. Ct. App. filed January 31, 2005) (Shearouse Adv. Sh. No. 7 at 33); Lingard v. Carolina By-Products, 361 S.C. 442, 446, 605 S.E.2d 545, 547 (Ct. App. 2004); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001). However, if the evidence as a whole is susceptible of more than one reasonable inference, the case must be submitted to the jury. Hurd v. Williamsburg County, Op. No. 25959 (S.C. Sup. Ct. filed March 28, 2005) (Shearouse Adv. Sh. No. 14 at 28); Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 426, 489 S.E.2d 223, 223 (Ct. App. 1997).

When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); Pond Place Partners v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002); Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), aff'd as modified by 352 S.C. 437, 574 S.E.2d 726 (2002). The issue must

be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 848 (Ct. App. 1997). Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Bell v. Bank of Abbeville, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947); Small, 329 S.C. at 461, 494 S.E.2d at 848. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation. Hanahan, 326 S.C. at 149, 485 S.E.2d at 908; Small, 329 S.C. at 461, 494 S.E.2d at 848. This does not mean the court should ignore facts unfavorable to the opposing party. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000); Love v. Gamble, 316 S.C. 203, 208, 448 S.E.2d 876, 879 (Ct. App. 1994). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Pond Place Partners, Inc., 351 S.C. at 15, 567 S.E.2d at 888.

This Court will reverse only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Abu-Shawareb v. S.C. State Univ. Op. No. 3968 (S.C. Ct. App. filed March 21, 2005) (Shearouse Adv. Sh. No. 15 at 86); Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). Essentially, our Court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor. Harvey, 350 S.C. at 309, 566 S.E.2d at 532; Hanahan, 326 S.C. at 149, 485 S.E.2d at 908.

LAW/ANALYSIS

Lockhart argues the circuit court erred in granting a directed verdict in favor of Huffines. We agree.

The Listing Agreement provided alternative conditions precedent to the broker's right to recover a commission. The first condition precedent required Huffines to procure a buyer or transferee who was "ready, willing and able to buy or exchange" for the Hendersonville property. Alternatively, Huffines was entitled to a commission if Lockhart actually sold or transferred the property to a "prospect procured by [Huffines]" within six months after the termination of the Listing Agreement. The circuit court erred in ruling Huffines was entitled to payment under either clause.

I. Ready, Willing, and Able

First, Lockhart contends the circuit court judge erred in directing a verdict on the basis that Huffines procured a buyer when the Listing Agreement required him to procure a ready, willing, and able buyer. We agree.

In issuing his ruling, the circuit judge stated:

> "[I]t was Mr. Huffines who made this deal take place, who put Ms. Lockhart in the position of selling this piece of property to the School District.
>
> There is no way in the facts of this case that this piece of property would have ever been sold to the School District had it not been for the work that Mr. Huffines did.
>
> Now, under those circumstances, and when Mr. Huffines brings this deal to the table and gets an agreement between them within the one year of the listing agreement, that is clearly to procure a purchaser within the term of that contract, and clearly he is entitled to his ten percent commission.

In the absence of an agreement, a broker is entitled to a commission when he procures a sales contract that is both valid and enforceable by the seller, regardless whether the contract actually closes. Helms Realty, Inc. v.

Gibson-Wall Co., Op. No. 25947 (S.C. Sup. Ct. filed February 22, 2005) (Shearouse Adv. Sh. No. 9 at 65); Dantzler Real Estate, Inc. v. Boland, 276 S.C. 275, 277-78, 277 S.E.2d 705, 706 (1981); Cass Co. v. Nannarello, 274 S.C. 326, 328, 262 S.E.2d 924, 926 (1980); Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 196, 232 S.E.2d 728, 729 (1977); Chambers v. Pingree, 351 S.C. 442, 451, 570 S.E.2d 528, 532 (Ct. App. 2002). The fact that a buyer and seller enter into a sales agreement without the broker's knowledge does not defeat his right to commission. Dantzler, 276 S.C. at 278, 277 S.E.2d at 706.

"The broker and the owner may, however, make the broker's right to the commission contingent upon the occurrence of certain conditions." Champion v. Whaley, 280 S.C. 116, 119, 311 S.E.2d 404, 406 (Ct. App. 1984) (citing Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 74 S.E.2d 575 (1953)); accord Chambers, 351 S.C. at 451, 570 S.E.2d at 532. A real estate broker suing on a conditional sales contract has the burden of proving that all conditions precedent to his right to a commission have occurred. Champion, 280 S.C. at 120, 311 S.E.2d at 406; Griffith v. Newell, 69 S.C. 300, 48 S.E. 259 (1904). "A broker assumes the risk of the purchaser's nonperformance where the purchaser's performance is a condition precedent to the owner's duty to pay the broker's commission." Chambers, 351 S.C. at 451, 570 S.E.2d at 532; accord Champion, 280 S.C. at 119, 311 S.E.2d at 406.

As a threshold matter, we note the Listing Agreement does not define "procure." According to The American Heritage Dictionary 958 (2nd College ed. 1982), the term means "[t]o obtain; acquire," or, "[t]o bring about." Williston on Contracts observes that procurement has been defined as "consisting of the broker's efforts that are the efficient cause, but not necessarily the sole cause, of a series of unbroken, continuous events, which culminate in the accomplishment of the objective of the employment." 23 Williston on Contracts § 62:19 (4th ed. 2004). Cf. Edmonds v. Coldwell Banker Residential Real Estate Servs. Inc., 377 S.E.2d 443 (Va. 1989) (finding a real estate broker is the procuring cause of a sale when it has originated or caused a series of events which, without break in their

continuity, result in the accomplishment of the prime object of its employment).

Lockhart admits that Huffines found a buyer for her property. When asked if Huffines introduced the School Board to her, she replied, "He found the School Board, yes." Duffie testified as follows to Huffines' role in brokering the transaction: "The property would not have been recommended by me or it wouldn't have been put on the list that the School Board was utilizing as a list of potential properties to buy. . . . I had specifically excluded it." It is clear from the record that but for the involvement of Huffines, the School Board would not have considered the Hendersonville property. Accordingly, we find that Huffines did procure the School Board for the purposes of the Listing Agreement. However, whether the School Board was a ready, willing, and able buyer is a separate inquiry.

The School Board was governed by the Consent Order which stated: "[T]he District will present any proposed site for a new school to the United States for its approval . . . ." Lockhart argues the School Board was not able to purchase the property until Justice Department approval was granted on November 1, 2000. Thus, she asserts Huffines did not procure a buyer who was ready, willing, and able to purchase the property before the expiration of the Listing Agreement on April 30, 2000.

> Each of the words "ready," "willing," and "able" expresses an idea that the others do not convey. All three of these elements must exist in the customer, in order to entitle the broker to a commission. It is not sufficient that the customer is ready and willing, but he or she must also have the ability to carry out the loan, sale, purchase, or exchange. So also, the procurement of a ready, willing, and able purchaser by a broker involves not only a showing that the purchaser has the financial ability to complete the contract, but also that the purchaser is ready and willing to purchase at a price and on terms prescribed by the vendor.
>
> . . . .

> In determining whether a ready, willing, and financially able purchaser is produced, developments subsequent to the time the transaction is closed, are not considered and are irrelevant.

12 C.J.S. Brokers § 225 (2004) (footnotes omitted). See generally Annotation, 87 ALR 4th 11 (observing the requirements of providing an "able" buyer; noting the term "able" refers to both legal and financial ability; and discussing numerous issues pertaining to a potential buyer's financial ability).

Conflicting testimony exists concerning the application of the required Justice Department approval. Lynette Bryant Fryar served on the School Board during the negotiations over the purchase of the Hendersonville property. At trial, Fryar averred the School Board could not have purchased the property in question without approval from the United States Justice Department. Duffie, however, testified the permission sought was not to purchase the property in question, but to build a school on that piece of property. He stated the School District could have purchased the Hendersonville property without the Justice Department's approval. Furthermore, even had the School Board been financially able to purchase the Hendersonville property without Justice Department approval, a jury might find that it would be unwilling to do so if the Justice Department withheld its permission to allow the School Board to build a new school on the property.

Consequently, we hold the circuit court erred in ruling Huffines earned his commission under the clause requiring him to procure a ready, willing, and able buyer within the time limits of the Listing Agreement. More than one reasonable inference can be drawn from the evidence in the record. Therefore, this issue should have been submitted to the jury.

II. Sale or Transfer Within Six Months of Expiration

Lockhart contends the circuit court erred in finding the property was sold for purposes of the Listing Agreement when the School Board signed the option agreement, and when the School Board voted to exercise the option.

The Listing Agreement stated: "[I]f within six months after the termination of this agreement I sell or transfer this property to a prospect procured by you prior to its termination, I shall pay you your commission." Thus, even if Huffines failed to procure a ready, willing, and able buyer before the expiration of the Listing Agreement, he is nonetheless entitled to a commission if the property actually sold by October 30, 2000—within six months of the agreement's expiration.

The circuit court judge proclaimed:

> . . . I am ruling that in May of 2000 when the School District signed the option agreement that that is a sale or transfer of the property as those terms are used in this contract, and I'm also ruling that in October—on the 17th of October 2000, when the School District voted to exercise the option that they had signed, that that also was a sale or transfer of the property.
>
> And I fully understand that those—that neither of those actions taken by the School District were binding on the School District.
>
> They could have changed their minds, but the—using the language of procured by you, that is a sale or is—that is indistinguishable on the facts of this case from the contract for sale that is entered into as it would be under normal circumstances.

A sale of real property is complete when the seller has an unconditional right, under a valid contract of sale, to demand performance from a purchaser. See Champion, 280 S.C. at 119, 311 S.E.2d at 406. No sales contract was executed in this case. However, an option contract was entered into between Lockhart and the School Board on May 8, 2000.

It is well settled in South Carolina that an option contract merely gives the right to purchase, without imposing any obligation to do so. Faulkner v. Millar, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995). An option is to be

distinguished from a sale or a contract to sell. Hutto v. Wiggins, 175 S.C. 202, 205, 178 S.E. 869, 871 (1935).

> The chief difference between a contract to sell and purchase real property, and an option to purchase said property lies in the fact that, while the former creates a mutual obligation on the part of one party to sell and the other to purchase, the option merely gives the right to purchase, at a fixed price, within a fixed time, without imposing any obligation to do so.

Id.

An option contract is a promise which limits the promisor's power to revoke an offer. Faulkner, 319 S.C. at 220, 460 S.E.2d at 380. An optionee who is not in possession of property assumes no risk and enjoys no interest in the property. Edens & Avant Invest. Prop. v. Amerada Hess Corp., 318 S.C. 134,136, 456 S.E.2d 406, 407 (Ct. App. 1995).

In Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000), our supreme court edified:

> Option contracts generally have three main characteristics: (1) they are unilateral contracts where the optionor, for a valuable consideration, grants the optionee a right to make a contract of purchase but does not bind the optionee to do so; (2) they are continuing offers to sell, irrevocable during the option period; and (3) the transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract.

Id. at 108, 531 S.E.2d at 292. Option contracts are strictly construed in favor of the optionor and against the optionee. Id. (citing Cotter v. James L. Tapp Co., 267 S.C. 647, 230 S.E.2d 715 (1976)).

We disagree with the circuit court that the parties intended an option contract to be considered a sale for the purposes of the Listing Agreement. The two sentences at issue in this case provide different mechanisms for triggering Huffines' entitlement to a commission. Under the first provision, Huffines' commission was not contingent upon the sale of the property. He would have been entitled to his commission even if no sale occurred, provided he procured a buyer who was ready, willing, and able to purchase. This provision is more broker-friendly than the common-law default rule which makes payment contingent upon the buyer and seller entering into a contract for the sale of the property.

The second provision makes actual sale or transfer within six months of the expiration of the listing agreement the trigger for payment of a commission. There is simply nothing to suggest that the parties meant anything other than "sell or transfer" when they used those terms in the Listing Agreement. An option to purchase does not give the seller an enforceable right and is not a sale. Accordingly, we hold that Huffines did not become entitled to a commission when the parties entered into the option contract.

Huffines argues Lockhart (1) interfered with his ability to negotiate the selling price under the Listing Agreement by hiring an attorney prior to April 30, the agreement's expiration date, and (2) prevented the property from selling within the sixth-month period. He contends that "even if the listing agreement contained a condition precedent, Huffines would still be entitled to his commission" because Lockhart prevented the condition from occurring.

On April 24, 2000, six days before the expiration of the Listing Agreement, Lockhart informed Huffines via letter that Brown would be handling negotiations of the property. As a result, Lockhart made a counteroffer to the School Board's proposal of $3,500 per acre through Brown rather than Huffines.

On September 18, 2000, Lockhart filed a clear title action to adjudicate the ownership of the Hendersonville property. According to Lockhart, her half brother informed her that "he was the oldest child, . . . that he should be

the one to distribute the property," and that "he thought he should have it." Her half brother allegedly informed Lockhart that "he had gotten an attorney in Savannah . . . . [t]o see what he could get." In response, Lockhart filed the clear title action. Lockhart's brother did not make an appearance, however. He was adjudged in default, and Lockhart was decreed owner of the Hendersonville property in fee simple absolute.

A broker ordinarily has the burden of proving that any conditions precedent to the duty of the seller to pay have been fulfilled. Champion, 280 S.C. at 120, 311 S.E.2d at 406. However, if a seller prevents a condition from occurring, then the condition is excused and his obligation to pay becomes unconditional. Id. (citing Shear v. National Rifle Association of America, 606 F.2d 1251 (D.C. Cir. 1979)); Chambers v. Pingree, 351 S.C. 442, 451, 570 S.E.2d 528, 532-33 (Ct. App. 2002); see also Helms Realty, Op. No. 25947 (S.C. Sup. Ct. filed February 22, 2005) (Shearouse Adv. Sh. No. 9 at 65 n.2) ("A party that wrongfully prevents satisfaction of a condition precedent to its performance is not excused from performing."). "It is sufficient for the plaintiff to present evidence that the defendant's prevention 'substantially contributed' to the nonoccurrence of the condition." Chambers, 351 S.C. at 452, 570 S.E.2d at 533. If the seller can then prove that the condition precedent would not have occurred regardless of the prevention, then the condition is not excused. Id.

In Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984), Champion had an exclusive listing agreement with the sellers. The agreement made Champion's commission contingent upon selling the house. Champion procured a potential buyer, Bell. Bell and the sellers entered a contract for the sale of the house, contingent upon Bell's obtaining financing. However, the sellers soon informed Champion that they had sold the house to another buyer. Loan officers, in the process of finalizing Bell's loan, attempted to appraise the house, but found it occupied by a man who told them he had purchased the house from the sellers. As a result, Bell's loan was not finalized.

Pursuant to the agreement, "[a] sale would be completed when the Sellers had an unconditional right, under a valid contract of sale, to demand

performance from a purchaser procured by Champion." 280 S.C. 119, 311 S.E.2d at 406. "Until that time, the risk of the purchaser's nonperformance was on Champion." Id. at 119, 311 S.E.2d at 406. We observed: "almost all cases in which prevention is alleged will involve speculation as to what would have happened had the defendant's conduct not taken place." 280 S.C. 121, 311 S.E.2d at 407. "In view of the difficulties of proof created by the Sellers' own conduct," we held that

> Champion was not required to show the loan would have closed "but for" the prevention of the condition. It is sufficient for the plaintiff to present evidence that the defendant's prevention 'substantially contributed' to the nonoccurrence of the condition. . . . Once he has made such proof, the burden shifts to the defendant. If the defendant can show that the condition would not have occurred regardless of the prevention, then the prevention did not contribute materially to its nonoccurrence and the condition is not excused.

280 S.C. at 122, 311 S.E.2d at 407. We remanded so that a jury could decide the question of prevention. Subsequently, in Chambers v. Pingree, 351 S.C. 442, 453, 570 S.E.2d 528, 534 (Ct. App. 2002), we articulated: "Champion clearly implies that the prevention of the condition precedent must be intentional or entail wrongdoing."

The record contains conflicting evidence concerning the allegation that Lockhart instituted the clear title action to delay the closing. Lockhart's brother did not make an appearance in the clear title action. Moreover, Lockhart's father deeded the property to her in September of 1997. However, the original option extended through November 10, 2000. Thus, the property might have sold outside the sixth-month period even if the clear title case had not been filed. Additionally, when asked if the clear title action had any effect on the School Board exercising its option, Duffie declared: "None that I know of." Yvonne Robinson, a member of the School Board during the time of the events in question, testified Lockhart did nothing to delay the closing.

The issue is one for a jury to resolve. If a jury finds the School Board was not a ready, willing, and able buyer, Huffines may still be entitled to the commission if the jury finds that Lockhart intentionally prevented the occurrence of the alternative condition precedent.

CONCLUSION

Viewing the evidence in the light most favorable to Lockhart, the factual issues are capable of more than one reasonable inference. The Listing Agreement entitled Huffines to a commission only if (1) Huffines procured a ready, willing, and able buyer before the expiration of the agreement, or (2) Lockhart sold or transferred the property within six months of the expiration of the Listing Agreement to a prospect procured by Huffines. Whether the School Board was a ready, willing, and able buyer was a question for the jury. Additionally, whether Lockhart intentionally prevented the occurrence of the alternative condition precedent is a jury issue. For edification on remand, we hold that a sale did NOT take place within the sixth-month expiration period. The directed verdict was thus improper. We reverse and remand this case for a new trial.

REVERSED AND REMANDED.

STILWELL, and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marty K. Cole and Tracy S. Cole, as co-administrators of the Estate of Kyle Austin Cole, and Tracy S. and Marty K. Cole, individually, Appellants,

v.

Pratibha P. Raut, M.D., and Dr. Raut & Associates, P.A., Respondents.

Appeal From Chester County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3995
Heard October 12, 2004 – Filed May 25, 2005

REVERSED AND REMANDED

Charles L. Henshaw, Jr., of Columbia, for Appellants.

Robert H. Hood, Roy P. Maybank, and Deborah Sheffield, all of Charleston, for Respondents.

HEARN, C.J.: In this medical negligence action, Marty and Tracy Cole appeal from a verdict in favor of Dr. Pratibha P. Raut

and her medical practice. The Coles argue the circuit court erred in charging the jury on assumption of risk. We agree, and reverse and remand for a new trial.

FACTS/PROCEDURAL BACKGROUND

The day before delivering her son, Kyle, Tracy Cole ("Cole") was admitted to the hospital. Cole's obstetrician, Dr. Raut, recommended that she undergo a vaginal birth after Cesarean section ("VBAC"). Although a VBAC carried risks including the possibility that the uterine scar from Cole's previous C-Section could rupture during labor and deprive the baby of oxygen, this procedure was the recommended method of delivery at that time. Cole signed a consent form acknowledging the risks associated with the VBAC procedure. She consented to a vaginal delivery, induction with medication, augmentation with medication, and retained the option of delivering by C-section if necessary. The consent form specifically stated that Cole:

> [R]ecognize[s] that during the course of the [procedure], unforeseen conditions may necessitate additional or different procedures or services than those set forth above and . . . further authorize[s] and request[s] that the above named surgeon . . . perform such procedures as are in his [sic] professional judgment, necessary and desirable.

The Coles admit that they "elected to face the risks of [VBAC]" and do not allege negligence in the doctor's choice of treatment to which they had consented. Rather, they complain that Raut's timing in ordering the C-section was a departure from the standard of care.

As part of the VBAC procedure, Raut induced Cole's labor on February 21, 1997. Despite the decision to proceed with the VBAC, Raut retained a surgical crew on-call in case an emergency C-section

became necessary. Cole's labor progressed slowly. At approximately 1:30 a.m. the following day, a fetal heart monitor indicated changes in the baby's heart rate. At approximately 2:00 a.m., changes in the baby's heart rate necessitated administration of oxygen to Cole and continued close observation of the baby's vital signs. At that time, Raut unsuccessfully attempted to notify the operating room personnel, who were engaged in another surgical procedure, to remain in the hospital. At 2:15 a.m., Cole began to complain of abdominal pains, indicating her uterine wall had ruptured and requiring an emergency C-section. At 2:20 a.m., Raut formally ordered that Cole undergo a C-section delivery. The surgical procedure began at 2:42 a.m., twenty-two minutes after the formal order. Kyle was born at 2:45 a.m. He suffered from brain damage and related problems including cerebral palsy, developmental delays, and a seizure disorder. Kyle died in August 2003 as a result of his conditions.

Both parties presented expert testimony. The Coles' expert testified that in this case, waiting until 2:20 a.m. to order a C-section was "not acceptable." He maintained that "early warning signs," including variables in the baby's heart rate, warranted that a C-section be ordered by 2:00 a.m. According to the Coles' expert, had Dr. Raut ordered the C-section by 2:00 a.m., the operating room staff should have been able to perform the surgery and deliver the child at the latest by 2:30. The Coles' expert testified that the baby would have been neurologically normal if he were delivered by "2:30 [a.m.] or 2:33 [a.m.] or 2:32 [a.m.]." The expert stated to a reasonable degree of medical certainty that "the doctor fell below reasonable standards of care when she failed to recognize the non-reassuring tracing [on the fetal heart monitor] at two o'clock and failed to set up for a possible emergency C-section."

Raut presented two expert witnesses who testified that she did not deviate from the appropriate standard of care with respect to the timing of the C-section. One expert testified that there were no signs mandating an emergency C-section until 2:20 a.m. at which time Raut recognized the problem "right away" and "immediately then called for a stat C-section."

During trial, Raut sought to amend her pleadings to include assumption of risk as an affirmative defense. The trial court reserved its ruling until the close of the evidence. At the close of the case, the trial court charged the jury on the law of negligence and on assumption of risk. The Coles objected to the charge of assumption of risk. The jury returned a general verdict for Raut. The Coles then moved for a new trial on the grounds that Cole never assumed the risk of a delayed emergency C-section. The trial court denied the motion.

SCOPE OF REVIEW

In reviewing a trial court's decision regarding jury instructions, an appellate court will not reverse absent an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. (citation omitted). The trial court is required to instruct the jury only on principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. Id. at 390, 529 S.E.2d at 539.

DISCUSSION

The Coles argue the trial judge committed reversible error by instructing the jury on assumption of risk. We agree.

"[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." Miller v. Schmid Labs., Inc., 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992) (quoting Dunsil v. E.M. Jones Chevrolet Co., 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977)).

"In order for the doctrine of assumption of the risk to apply, the injured party must have freely and voluntarily exposed himself to a

known danger which he understood and appreciated." Faile v. Bycura, 289 S.C. 398, 399, 346 S.E.2d 528, 529 (1986) (citation omitted). The specific requirements of the defense of assumption of risk are: "(1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger." Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 79, 508 S.E.2d 565, 569 (1998) (citation omitted).

> The doctrine of assumption of risk involves an intelligent and deliberate choice between a course known to be dangerous and what is not dangerous. It involves the taking of a calculated risk. Assumption of risk is a matter of knowledge of a danger and the intelligent acquiescence in it. The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury.

Senn v. Sun Printing Co., 295 S.C. 169, 173, 367 S.E.2d 456, 458 (Ct. App. 1988).

In the present case, Cole signed a consent form acknowledging the risks associated with the VBAC procedure. The consent form suggests Cole freely and voluntarily exposed herself and her child to a known danger associated with the VBAC procedure, which she understood and appreciated. However, nothing in the record suggests Cole assumed the risk associated with a delayed C-section delivery of her child following her decision to undergo the VBAC. Cole had no knowledge of the danger posed by a delay between the warning signs and the time the C-section was commenced. Moreover,

Cole had no knowledge of the circumstances surrounding the delay. Without this knowledge, Cole could not appreciate the nature and extent of the danger or voluntarily expose herself and her child to such a danger. As a result, the trial judge erred in charging the jury on assumption of risk.

"The giving of an erroneous instruction is not reversible error, unless the appellant can show that he was injured and prejudiced thereby." Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). In Ellison, the court found the trial judge erred in instructing the jury "that pecuniary loss will be presumed where the beneficiaries of the action for wrongful death are the widow and minor children of the decedent, when it is undisputed that all of the decedent's children are adults." Id. at 370, 120 S.E.2d 209, 212. However, the court found the error was not reversible because the appellant failed to show the charge was prejudicial when pecuniary loss was undisputed at trial and the judge also charged the jury on the elements to consider in awarding damages. In so holding, the Ellison court distinguished two cases, Wright v. Harris, 228 S.C. 144, 89 S.E.2d 97 (1955) and Citizens Bank of Darlington v. McDonald, 202 S. C. 244, 24 S.E.2d 369 (1943).

In Wright, the court stated:

> [I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial. Conflicting and irrelevant instructions constitute reversible error[;] and a trial Judge ought to take care not to confuse the jury by charging them on legal principles which are inapplicable to the case on trial . . . .

228 S.C. at 148, 89 S.E.2d at 98 (citations omitted). The Wright court held an erroneous charge on breach of contract accompanied by a fraudulent act to be reversible error where the causes of action were founded solely in fraud and deceit. The Ellison court analyzed the erroneous charge in Wright, stating "[i]t is readily apparent that such a

charge was prejudicial to the appellant." 238 S.C. at 372, 120 S.E.2d at 213.

Similarly, in Citizens Bank of Darlington, the sole issue for trial was the genuineness of a payee's signature on a check. 202 S.C. at 250, 24 S.E.2d at 373. The court determined that the trial judge erred in instructing the jury on conflicting burdens of proof and erred in charging the jury on estoppel. The court held that it was reversible error for the judge to give conflicting instructions and to instruct on irrelevant issues. Id. at 255, 24 S.E.2d at 375; See also Ellison, 238 S.C. at 372, 120 S.E.2d at 213.

The principles enunciated in Wright and Citizens Bank of Darlington have been consistently applied by this court and the supreme court. See Miller v. Schmid Labs., Inc., 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992) (finding reversible error to charge the correct definition of bilateral contract because the issue was irrelevant to whether an employee handbook could form the basis of a contract between an employer and employee); White v. Fowler, 276 S.C. 370, 372, 278 S.E.2d 777, 778 (1981) (stating that when the only reasonable inference from the evidence was that respondent's actionable negligence caused the accident, a charge on unavoidable accident was irrelevant and prejudicial); Dunsil v. E.M. Jones Chevrolet Co., 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977) (finding reversible error when "[t]he instructions by the court of irrelevant and inapplicable principles of law was clearly erroneous and may have been confusing to the jury"); Brown v. Howell, 284 S.C. 605, 610, 327 S.E.2d 659, 662 (Ct. App. 1985) (concluding the trial judge's instruction on avoidable accident was prejudicial when the issue was abandoned at trial).

In the present case, the erroneous charge of assumption of risk was irrelevant and inapplicable to the Coles' allegations. The evidence demonstrates that while Cole may have assumed the risk for the VBAC procedure, she never assumed the risk for a delayed C-Section delivery, which was the basis of the Coles' causes of action. The assumption of risk charge had the potential to confuse the jury

concerning the underlying factual basis of the Coles' claims and availed Raut with a defense that was not supported by the evidence. As a result, the Coles were prejudiced by the erroneous charge.

The Respondents argue that any prejudice occasioned by the erroneous charge is specifically defeated by the "two issue rule." In essence, the Respondents are asserting that the Coles have failed to demonstrate any prejudice because the jury returned a general defense verdict, and we have no way to discern if it decided in favor of Raut on the assumption of risk defense or against the Coles on their negligence claim. We disagree.

As explained above, the trial judge instructed the jury on an inapplicable defense to the Coles' medical negligence claims. Such an error likely confused the jury with respect to the relevant legal principles as well as the underlying facts of the causes of action subject to the inapplicable defense. Thus, because the Coles' negligence claims were adversely impacted by the erroneous charge, the Coles' prejudice is not defeated by the "two issue rule." The general defense verdict is not independently supported by the negligence cause of action, and the Coles have no other causes of action to support the general verdict. See Ricks v. Jackson, 159 N.E.2d 225, 227 (Oh. 1959) (explaining the two issue rule is used as a means of requiring an affirmative showing of prejudice in order to justify reversal, and finding that despite the two issue rule, an error in charging the jury on contributory negligence was prejudicial and reversible error).

Furthermore, we believe applying the "two issue rule" under the circumstances of this case presents an "unusual application" similar to the one that was soundly rejected in Anderson v. South Carolina Dep't of Highways & Pub. Transp., 322 S.C. 417, 419, 472 S.E.2d 253, 254 (1996). In Anderson, the trial judge submitted the issue of general negligence and the defense of contributory negligence to the jury. The jury returned a general verdict in favor of the defendant. After the verdict, the trial court belatedly granted plaintiff's motion for a directed verdict on the issue of negligence. The court noted that it had no way to tell whether the jury returned a verdict in

favor of the defendant due to the plaintiff's failure to prove negligence or the defendant's success in proving contributory negligence. As a result, the trial court granted a new trial. The court of appeals reversed, "essentially [finding] the trial court erred by not applying the 'two issue' rule to uphold the jury's verdict." Id. at 421, 472 S.E.2d at 255. The supreme court declined to adopt "this unusual application of the 'two issue' rule" for the following three reasons: (1) the rule is utilized by courts on appeal, not trial courts, (2) the rule is a procedural tool for upholding, not reversing decisions, and (3) such an application would discourage trial courts from correcting errors. Id.

Like Anderson, applying the rule in this case could very well have the effect of discouraging trial courts from correcting errors. Here, the trial judge had an opportunity to correct the error by granting the Coles' motion for a new trial. He did not do so, ostensibly because he did not believe his earlier decision to charge assumption of risk was error. However, were we to accept Respondents' argument on the "two issue rule," a trial judge who realizes he or she has made an error during a trial could be inclined not to correct it and to uphold the verdict. Thus, we believe this application of the rule is proscribed by the supreme court's Anderson decision.

Furthermore, accepting the Respondents' argument to employ the "two issue rule" to affirm the verdict despite an erroneous charge on the defense of assumption of risk would arguably place a heavy burden on trial lawyers to request a special verdict form in every case. Here, the Coles' attorney objected at every available opportunity, including post-trial, to what he perceived to be an erroneous charge. It was not necessary to also request a special verdict form in order to preserve this objection.[1]

[1] Although we do not believe a special verdict form was necessary to preserve the Coles' objection to the charge on assumption of risk, we note that Raut had already requested a special verdict form, which was specifically rejected by the trial judge. To say that the Coles needed to also request a special verdict form to protect their objection to the jury instruction would be to require an exercise in futility. This court does

CONCLUSION

The trial judge erred in instructing the jury on the defense of assumption of risk, and the Coles were prejudiced by the erroneous jury instruction. As a result, the verdict is hereby reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

HUFF, J., concurs and KITTREDGE, J., dissents in a separate opinion.

KITTREDGE, J., dissenting: I respectfully dissent. I would affirm the general defense verdict pursuant to the "two issue" rule.

In my judgment, this is a difficult case, for we are confronted with an apparent tension between the presumption of validity accorded a general verdict in multi-issue cases—and the concomitant viability of the "two issue" rule in South Carolina—and the principle that an erroneous *and prejudicial* jury instruction warrants reversal. At bottom, I believe the proper resolution of this appeal turns on the degree of prejudice necessary to merit reversal in the context of an erroneous jury instruction and a general verdict involving two or more issues. The majority, as I do, recognizes that the Appellants might have been prejudiced by the erroneous jury instruction. Where I part company with the majority is their attempt to syllogize from the "potential" for prejudice to an absolute, affirmative finding of prejudice. I characterize the claim of prejudice to the Appellants as nothing more than speculation. I adhere to the view that more is

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not require parties to engage in futile actions in order to protect their interests on appellate review. See generally Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000); Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756; Carter v. Peace, 229 S.C. 346, 93 S.E.2d 113 (1956).

required to satisfy the prejudice prong. This view, I believe, more closely comports with the foundational principle of appellate procedure that "[a]n error not shown to be prejudicial does not constitute grounds for reversal." Brown v. Pearson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997). Moreover, such a view maintains the efficacy and even-handed application of the "two issue" rule in this state.

PROCEDURAL BACKGROUND

The trial court instructed the jury that Marty K. Cole and Tracy S. Cole were entitled to prevail if the jury found Dr. Pratibha P. Raut was negligent "in at least one or more of the ways alleged . . . [and that] the defendants' negligence was the proximate cause of the plaintiff's injuries." At the conclusion of the charge on the assumption of risk affirmative defense,[2] the court stated:

> However, I charge you, on the other hand, if you find that the plaintiff's injuries and negligence were the result of the defendant's negligence, then in such circumstance your verdict would be for the plaintiff.

Dr. Raut urged the trial court to submit a special verdict form "with specific questions for the jury . . . [including whether] plaintiff has proved [the negligence claim] by the greater weight or preponderance of the evidence." The trial court denied Dr. Raut's request for a special verdict form. The Coles did not request a special verdict form, although they were aware that assumption of risk would be charged.

The jury returned a general defense verdict.

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[2] The doctrine of assumption of risk was largely subsumed by the law of comparative negligence in Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998). However, the cause of action in the present case arose in February 1997, prior to Davenport.

The Coles sought a new trial on the basis that assumption of risk was erroneously charged. The motion was denied, and judgment was entered for Dr. Raut and her medical practice. The Coles appeal only from the trial court's decision to charge the jury on the assumption of risk defense.

DISCUSSION

While I agree with the majority that it was error to charge the jury on the defense of assumption of risk, I would find the general defense verdict is independently supported by the unchallenged submission of the negligence claim to the jury. This principle is generally referred to as the "two issue" rule.

The "two issue" rule—sometimes referred to as the "general verdict" rule—is based on the principle that reversal is inappropriate where no error is found as to one of the issues that may independently support the jury's verdict. South Carolina is among an apparent minority of states that has adopted the rule. South Carolina's first recognition of the rule, as best I can determine, came in 1926 in the case of Hussmann Refrigerator & Supply v. Cash & Carry Grocer, Inc., 134 S.C. 191, 132 S.E. 173 (1926). In Hussmann, the plaintiff filed an action in claim and delivery for possession of a refrigerator. The defendants answered with a general denial and a counterclaim. The jury rendered the following verdict: "We find for the plaintiff possession of the goods." Id. at 194, 132 S.E. at 173. The defendants moved for a new trial on "the ground that it did not appear from the verdict that the jury had passed upon [the counterclaim]." Id. The trial court granted the new trial motion. The supreme court reversed and reinstated the jury verdict. In so holding, the court relied on the principle that later became identified as the "two issue" rule:

> [W]hen there are several issues in the case submitted to a jury under full instructions, a general verdict in favor of one or the other of the parties, in the absence of objection to the verdict not having passed upon the several

> issues separately, will be held to have concluded all the issues.

Id. at 196, 132 S.E. at 174 (emphasis added).

> The Hussmann court further noted that "[t]he defendants had no right to remain silent under the apprehension that the irregularity might be corrected against their interest and afterwards complain of it." Id. at 194, 132 S.E. at 174.

The Nebraska Court of Appeals, I believe, properly describes the policy underpinnings of the "two issue" rule:

> The general verdict rule provides that where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were resolved in favor of the prevailing party, and, where a single determinative issue has been presented to the jury free from error, any error in presenting another issue will be disregarded . . . On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. Therefore, unless an appellant can provide a record to indicate that the result of the trial was a result of the trial errors claimed on appeal, rather than from proper determination of the error-free issues, there is no reason to spend the judicial resources to provide a second trial.

Lahm v. Burlington Northern R.R. Co., 571 N.W.2d 126, 131 (Neb. App. 1997) (internal citations omitted).

One of the leading South Carolina cases dealing with the "two issue" rule—the case cited most frequently—is Anderson v. West, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978) ("[W]here a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed."). We are confronted here with the submission to the jury of an error-free negligence claim and a challenged jury charge on the affirmative defense of assumption of risk.

I recognize the limited applications of the "two issue" rule, for the "rule may be applied by appellate courts in a few situations." Anderson v. South Carolina Dep't of Hwys. & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 254 (1996). In Anderson, our supreme court addressed and rejected an "unusual application" of the "two issue" rule. Id. at 421, 472 S.E.2d at 255. Anderson was injured in a fall on a sidewalk, and she sued the South Carolina Department of Highways and Public Transportation on a theory of negligence in maintaining the sidewalk. Anderson moved for a directed verdict as to liability, but the trial court deferred ruling on the motion. The case was submitted "to the jury on the issues of general negligence and contributory negligence, and the jury returned a general verdict for Highway Department." Id. at 419, 472 S.E.2d at 254. The trial court then granted Anderson's directed verdict motion, ruling as a matter of law that the Highway Department was negligent in its maintenance of the sidewalk. The trial court granted a new trial since it could not determine "whether the jury reached its verdict for Highway Department on the basis of Anderson's failure to prove improper maintenance, Anderson's failure to prove proximate cause, or Highway Department's success in proving contributory negligence." Id.

On appeal, this court reversed the granting of the new trial, finding the jury verdict should have been sustained under the "two issue" rule. Anderson v. South Carolina Dep't of Hwys. & Pub. Transp., 317 S.C. 280, 282, 454 S.E.2d 353, 354-55 (Ct. App. 1995). The supreme court granted certiorari and affirmed in result, but rejected the application of the "two issue" rule. Anderson provides a thoughtful

analysis of the appropriate application of the "two issue" rule. Of particular note is the court's discussion of the three reasons for rejecting the "two issue" rule in that case:

> Initially, the rule is utilized by courts on appeal, not trial courts. Secondly, the rule is a procedural tool for upholding, not reversing, decisions. Thirdly, the practical effects of the Court of Appeals' application of the "two issue" rule are undesirable. Such an application would discourage trial courts from correcting errors. Because the jury's general verdict could potentially be upheld anytime it was susceptible of two or more constructions, there would be no incentive for trial courts to correct errors, such as through the direction of a post-trial verdict.

Anderson v. South Carolina Dep't of Hwys. & Pub. Transp., 322 S.C. at 421, 472 S.E.2d at 255.

In my judgment, the reasons favoring application of the "two issue" rule predominate in the case before us. First, we would be invoking the rule in the context of appellate review.[3] Next, we would be utilizing the rule to uphold the judgment below. And finally,

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[3] This factor—invoking the "two issue" rule only at the appellate level—illustrates the undesirable consequences of this court's short-lived holding in Anderson. This court in Anderson essentially *mandated* that a trial court apply the "two issue" rule to sustain a general verdict even if the trial court found error in its own rulings. This court's ruling in Anderson was nothing short of a direct intrusion on a trial court's ability to alter, amend or set aside a verdict or judgment. In the case before us, application of the "two issue" rule constitutes no such intrusion.

application of the rule under these circumstances should not discourage trial courts from correcting errors.[4]

This court, subsequent to Anderson, applied the "two issue" rule in circumstances procedurally similar to those presently before us. In the case of Bryant v. Waste Management, Inc., 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000), Bryant asserted six theories of negligence. The jury returned a general verdict for Bryant. The trial court denied the post-trial motions, from which Waste Management appealed. We agreed with Waste Management that "the trial court erred in instructing the jury that a violation of federal Occupational Safety & Health Administrations . . . regulations constitutes negligence per se." Id. at 166, 536 S.E.2d at 384. We nevertheless affirmed, and in relying on the "two issue" rule, we noted the speculative nature of Waste Management's prejudice argument:

> Waste Management, however, has not shown it was prejudiced by [the erroneous jury instruction] because there existed other bases upon which the jury could find it liable . . . Because the jury rendered a general verdict and could have relied upon any of these [other]

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[4] The majority advances the argument that the "two issue" rule will discourage trial courts from correcting errors. This argument is premised on the notion that the "trial judge had an opportunity to correct the error by granting the Coles' motion for a new trial . . . [and] [h]e did not do so, ostensibly because" he believed his ruling to be the correct one. I find nothing in the record to suggest that the trial court somehow realized its error. Absent evidence to the contrary, I believe we must assume that a trial judge makes a ruling because he or she believes the ruling is the correct one. The trial court in Anderson, for example, granted a new trial and did not seek cover behind the "two issue" rule. I believe our fine trial judges are entitled to the presumption that their rulings—even if determined to be in error—are the result of a well-intentioned desire to render correct rulings.

> allegations of negligence to find Waste Management liable and because there is ample evidence supporting at least one of these [other] allegations . . . we cannot say Waste Management was prejudiced by the jury charge in issue.

Id. at 167-68, 536 S.E.2d at 384-85.

Bryant is merely one case among many holding that an erroneous jury instruction, absent a showing of resulting prejudice, will not warrant reversal. See Sierra v. Skelton, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992) (affirming general verdict under "two issue" rule, noting that rule applies to "a situation where . . . the trial court erred in the jury instructions"); Piedmont Aviation, Inc. v. Quinn, 294 S.C. 502, 505, 366 S.E.2d 31, 32-33 (Ct. App. 1988) (holding where case is submitted to jury on two causes of action and jury returns a general verdict, error by trial court in its instructions on second theory is of no consequence where verdict is supportable under first theory).

I now turn to a related principle—"it is reversible error to charge a correct principle of law as governing a case where such principle is inapplicable to the issue on trial." Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). This seems to me the strongest argument of the Coles to receive a new trial. However, this general principle is applied where "[i]t is readily apparent that such a charge was prejudicial to the appellant." Id. Perhaps the Coles were prejudiced by the giving of the assumption of risk charge. Neither the majority nor I know for sure.[5] We certainly cannot say it is "readily

[5] The uncertainty concerning prejudice is, in my judgment, the critical feature in the proper resolution of this appeal. The majority and I agree that the Coles might have been prejudiced. As stated at the outset, I part company with the majority in their leap from the "potential" for prejudice to an absolute, affirmative finding of prejudice. The bottom line is that we do not know whether the Coles were prejudiced by the erroneous jury instruction. If the possibility of

apparent" the challenged charge was the basis of the jury verdict. This uncertainty brings me back to the "two issue" rule.

The touchstone of the "two issue" rule is its concern with prejudice. As noted, an appellant must show not only error, but also prejudicial error, to secure reversal of an adverse judgment. The prejudice prong, in the context of the "two issue" rule, is generally established by the mere request at trial for an appropriate special verdict form. See Hussmann, 134 S.C. at 196, 132 S.E. at 174 (noting "the absence of objection to the verdict not having passed upon the several issues separately"); Smoak v. Liebherr-America, Inc., 281 S.C. 420, 421, 315 S.E.2d 116, 118 (1984) (upholding denial of post-trial motion, and affirming general verdict under "two issue" rule with court noting that "the record indicates the trial judge asked the respective attorneys for assistance in constructing a special verdict form to submit to the jury, but received none"). Here, the Coles leave to conjecture the claim of prejudice. After the trial court announced its decision to charge assumption of risk, the Coles voiced no complaint with the general verdict form, and remained silent when Dr. Raut was requesting a special verdict form.[6] I would find that the Coles have failed to establish the critical prejudice prong.

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prejudice arising from an erroneous jury instruction is sufficient to warrant reversal, the majority reaches the correct result.

[6] The Coles, to their credit, make no attempt to bootstrap Dr. Raut's request for a special verdict form to their advantage. See Tupper v. Dorchester County, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (stating an appellant may not preserve an issue for appeal by way of another party's objection or challenge). The majority seeks to avoid this principle—and give the Coles a pass—on the basis that a similar motion by the Coles would have been "an exercise in futility." We do not know what the trial court would have done if the Coles had also requested a special verdict form. Perhaps a request for a special verdict form from *both* parties would have swayed the trial court to grant the requests. That, of course, is speculation, but I submit it is equally as valid as the majority's guesswork. My preference is to avoid

The Coles and the majority cite Ricks v. Jackson, 159 N.E.2d 225 (Ohio 1959) for the proposition that prejudice is presumed and the "two issue" rule does not apply when there was a charge on an issue upon which the jury should not have been charged. The Ohio Supreme Court has since retreated from a strict application of the holding in Ricks. That court has since twice applied the "two issue" rule to uphold general verdicts where appellants failed to establish prejudice in connection with erroneous jury instructions. Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 739 (Ohio 2000) (applying "two issue" rule to affirm general verdict and noting that Ricks does not set forth a rule of mandatory reversal where a charge is erroneously given); Wagner v. Roche Labs., 709 N.E.2d 162, 166 (Ohio 1999) (applying "two issue" rule to uphold a general verdict and finding an insufficient showing of prejudice, noting that the defendant "failed to request interrogatories that might have explained the jury's general verdict").

A general verdict is presumptively valid. See Gold Kist, Inc. v. Citizens & Southern Nat'l Bank of South Carolina, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) ("The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict."). The Coles concede the negligence claim involved disputed issues of fact and was properly submitted to the jury. The general defense verdict may therefore be sustained on the negligence claim, notwithstanding the erroneous assumption of risk instruction.

I do agree with the majority that application of the "two issue" rule places a burden on trial lawyers. I would go further by acknowledging that most of the issue preservation rules are burdensome on trial practitioners. Those rules, however, are designed to encourage precision and clarity of issues. I do not view the burden here as onerous. The request for a special verdict form is not uncommon in our state's trial courts, as Dr. Raut's request illustrates.

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speculation and apply the rule that one party may not bootstrap or benefit from another party's objection or challenge.

And finally, with the majority's concern for the burden of requesting a special verdict form, we have introduced a new consideration. The "two issue" rule has served plaintiffs quite well in sustaining general verdicts without the slightest concern for the burden on defendants to request special verdict forms. I believe the "two issue" rule sustains the general defense verdict here.

CONCLUSION

In sum, I accord the general verdict here a presumption of validity and find this appeal presents a proper application of the "two issue" rule. The inability of the Coles to establish prejudice resulting from the erroneous jury instruction is the cornerstone of my view of the case. Since I believe the general defense verdict may be sustained on the negligence cause of action, I would affirm.